on the English Order XVI rules 22 to 31 which were however revised in 1913 and again in 1926. The sections nowhere say that a pauper is not to pay costs, but the implication from section 774—"The Court or a Judge may order costs to be paid to a person admitted to sue or defend as a pauper"—is that the Court has no jurisdiction to order costs to be paid *by* a pauper.

Dr. Withers Payne for the plaintiff submitted that there were only three cases in which a pauper litigant could be ordered to pay costs. They are said to be:—

(*a*) Where there has been a frivolous appeal. The authority for this is the case of *Drummond* v. *Harvey*, 1927 W.N. p.280, where however costs were not awarded and the *dictum* is therefore *obiter*. In *Gordon* v. *Goldstein*, 132 L.T. at p.154 the Master of the Rolls also claimed that the Court of Appeal had jurisdiction to order costs against a pauper but again the discretion, if any, was not exercised. In both these cases the Court claimed that it had discretion by virtue of Order XVI Rule 31E of the 1913 Rules and Orders.

(*b*) Costs of an intervention by the King's Proctor.

It is certainly stated in the current Annual Practice p.278 that a pauper can be ordered to pay the King's Proctor's costs but the case of *Roberts* v. *Roberts*, 1916 Probate, p.187, is hardly an authority. The petitioner in that case obtained a decree *nisi* as a pauper but the ground given for ordering him to pay costs was that there was no order that he should appear in the intervention as a pauper.

In the later case of *Elliott* v. *Elliott*, 37 T.L.R. p. 834 the costs of the King's Proctor were allowed against the pauper petitioner by virtue of the discretion given to the Court by Order XVI Rule 31E of the 1913 Rules.

Now Order XVI Rule 31E in the 1925 Annual Practice p. 265 reads as follows:—

> "When a person is applying or is admitted to take or defend or be a party to any legal proceedings as a poor person he shall not be liable for any Court fees, *nor, unless the Court or a Judge shall otherwise order, to pay costs to any other party, etc.*"

It should be noted that although the 1913 Rule was in England repealed by the 1926 Rules and Orders, the discretion to order a pauper to pay costs was preserved by the present Order XVI Rule 28(1). But there is no corresponding section in the Civil Procedure Code which gives any such discretion. Section 768 which, like Order XVI Rule 28 (1), refers to the question of Court fees, omits all mention of any discretion as regards the payment of costs and the English cases as to the exercise of a discretion in certain cases have no application in this Colony.

(*c*) The third supposed exception is that a pauper may be ordered to pay the costs up to date as a condition for an order for amendment of his pleadings. But that is quite a different matter. If he does not pay, he cannot amend, but that does not mean that he is ordered to pay if he does not amend.

On examination, therefore, the supposed exceptions to the general rule are really not exceptions at all, and I find that there is no jurisdiction to order a pauper to pay costs to an opposite party.

As regards the costs before the plaintiff gave notice of the order admitting him to sue as a pauper, there is no reason why he should not pay these costs (see *Prince Albert* v. *Strange*, 64 E.R. at p. 321), and I order accordingly that the costs up to April 9th, 1934, be taxed as between party and party and paid by the plaintiff to the defendants. The defendants are entitled to be indemnified out of the general estate of Ho Sok Choo Neo and their costs should be taxed as between solicitor and client with a certificate for two counsel.

Order refused.

Solicitor for the plaintiff—*C. H. Withers Payne.*

Solicitors for defendants—*Braddell Brothers.*

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

August 31, 1934.

V. KANTHAN.....Plaintiff

vs.

M. S. K. S. KANDASAMY CHETTY..Defendant

[PENANG IN FORMA PAUPERIS Suit No. 191 of 1933]

Limitation of suits—claim for wages—"tindal" whether a "labourer"—wages deposited with employer for accumulation—repayment on demand—starting point of period of limitation—Ordinance No. 56 (Limitation), Arts 2, 42, 84.

A "tindal" whose duties consist of supervising coolies, keeping a check roll, etc., is not a "labourer" within Article 2 of the Schedule to Ordinance No. 56 (Limitation) and a claim by him for wages falls within Article 84.

Where a servant enters into an agreement with his employer that his wages should be allowed to accumulate in his employer's hands, the servant drawing from time to time what he requires for expenses and a balance being struck when the servant leaves the employer's employment.

Held, that the money so left with the employer is "money deposited" within the meaning of Article 42 of Ordinance No. 56 (Limitation) and that time only begins to run from the date on which a demand for payment is made.

ACTION tried before Whitley, J.

K. S. Lim for the plaintiff.

Ross for the defendant.

The facts appear sufficiently from the Judgment below.

Cur. Ad. Vult.

WHITLEY, J.—This case raises two interesting points under Ordinance No. 56 (Limitation).

The plaintiff formerly worked as a coolie at a stone quarry off Green Lane Penang belonging to the defendant who also has a shop 97 Chulia Street Penang. Up to the end of April, 1929 he worked as an ordinary coolie breaking stone and digging sand. The amount of his average monthly earnings is in dispute. On 1st May, 1929, he took the place of the defendant's former tindal. The terms upon which he was engaged are in dispute. He says he was to receive $25/- per month; the defendant says his wages were to be $12/- per month out of which he had to pay defendant $7/- per month for food and $1/- per month for rent. It is common ground that the wages were to be allowed to accumulate in the defendant's hands, the plaintiff drawing from time to time what he required for expenses and a balance being struck when the plaintiff left defendant's employment.

The plaintiff says that his wages were raised from $25/- to $30/- as from 1st January, 1930. The defendant says that his wages were raised from $12/- to $13/- as from 1st May, 1930.

Early in 1932 plaintiff wished to go to India to get married. He asked defendant to pay what was due to him but the defendant asked him to defer his departure as his evidence was necessary in a case which was pending in the Supreme Court. The plaintiff stayed and gave evidence in April, 1932. Judgment was given against the defendant with costs. As to what happened then there is a conflict of evidence. The plaintiff says that he again asked for his money and that the defendant said he could not pay then as he had lost a great deal of money over the case. After negotiations the defendant agreed to pay him 300 rupees and his passage money to India and to pay him the balance on his return. When the plaintiff asked him for a note of what the balance was the defendant became angry, refused to pay him anything, and dismissed him. The defendant admits that in May, 1932, the plaintiff wished to settle the account but says that upon inspection of the defendant's books he was satisfied, and agreed that he has overdrawn and owed $12/- to the defendant on the balance. On this point I unhesitatingly reject the defendant's version and I believe the plaintiff.

On 11th May, 1932, the plaintiff wrote demanding the balance of his wages, which he, having kept no record, estimated at $1,140/-. The next day the defendant replied setting out an account which showed a balance of $12.55 in defendant's favour. The plaintiff immediately sent an indignant letter which to my mind rings genuine. He points out that he realises that the defendant is in financial difficulties owing to the judgment against him and says he is prepared to give him time in which to pay.

The plaintiff did not issue his Writ until 16th June, 1933. He explains this delay by saying he had no money. Eventually he obtained leave to sue *in forma pauperis*. His claim is for balance of wages due and for $30/- being one month's wages in lieu of notice. The specially indorsed writ was later amended by adding an alternative claim for "balance of wages deposited with the defendant." In his defence the defendant alleges that the wages agreed upon were $12/- per month and claims that on the balance of account plaintiff has drawn more than was due to him. By paragraph 4 he avers that it was agreed that he should supply the plaintiff with food and pay his house rent but in his evidence at the trial he said that the arrangement was that the plaintiff should pay him for food and housing. His counsel admitted that he is bound by his pleadings and must abandon this part of his case. That being so the only substantial question of fact remaining to be decided is the rate of wages agreed upon. A great deal of conflicting evidence was given on this point but I propose to dispose of it very shortly by stating that I entirely disbelieve the defendant. His suggestion that the plaintiff agreed to work as a tindal for $12/- per month less $7/- for food and $1/- for rent is manifestly absurd. That leaves only $4/- per month. The previous tindal admittedly received $25/- per month and the defendant paid $6/- per month to the witness Sandara Rajayah who took over a small part of the plaintiff's work when he left. This man was employed at a temple close by and merely called in at the quarry for less than an hour each day to give surats to the coolies.

The defendant sought to establish his case by certain entries in his books. Close inspection of these has satisfied me that the entries upon which he relies were made after the issue of the writ for the purposes of this case. In Book No. 5 (Exhibit "C") plaintiff's account appears on pages 67, 93 and 480. At the foot of page 67 a note in red ink carried the account over to page 93. A similar note carries it over from 93 to 480 and from 480 to page 17 of Ledger No. 6. On none of these pages is plaintiff debited with charges for food or lodging. The note at the foot of page 67 has been obviously altered. 41 has been written over 93 and the words "of a new book" added. The new book was produced described as a Wages Ledger (Exhibit "C") and here for the first time we find plaintiff debited

with arrears for food at $8/- (not $7/-) and rent at $1/- for 14 months. Thenceforward he is duly debited each month with these items of $8/- and $1/-. The defendant's clerk Veerasamy explained that his predecessor had omitted to make these charges, so he re-wrote the account in this book in 1932 on defendant's instructions. Apparently in order to make it look more convincing he selected blank pages here and there although there were some hundred blank pages available at the end. Unfortunately he made one fatal mistake. On page 42 he inadvertently wrote down the year as 1933. The subsequent alteration to 1931 is very obvious. Now whilst at the beginning of a new year one may often by mistake write down the date of the old year, I have never yet heard of a person who by mistake writes down the date of a year which has not yet arrived. What happened seems clear. As a result of losing his case the defendant had not the money to pay the plaintiff. He calculated that if he put the plaintiff's wages at $12/- rising to $13/- and charged him with the items for food and rent he could make the account show a small balance in his (defendant's) favour and nothing due to the plaintiff. There were no entries in his books to support these figures so he did not allow the plaintiff access to the books. When however the plaintiff issued his writ in 1933 the defendant realised that he would have to produce his books and had these alterations made accordingly. The clerk, writing in the year 1933, not unnaturally made these two slips over the year. It is significant that the only entries of the amount of plaintiff's wages are also in this mysterious book.

The plaintiff struck me as a truthful witness who honestly believed in the merits of his case and I accept his evidence that he was engaged at $25/- per month but I am not satisfied that there was any subsequent increase. It seems unlikely that with prices and wages falling in 1931 the defendant would have agreed to such a request. I believe the plaintiff and entirely reject the defendant's evidence on the question of food and rent. It follows then that the plaintiff is, subject to the defence of Limitation, entitled to recover wages at the rate of $25/- per month from 1st May, 1929 to the 5th May, 1932 (the date when Sandara Rajayah's book shows that he took over) together with one month's wages for wrongful dismissal, this claim not being traversed in the defence. That works out at $929/- from which must be deducted cash received on account which was agreed at $180.55 leaving a balance of $748.45.

I will now come to the defence under Ordinance No. 56 (Limitation). It is contended that the claim is for the wages of a labourer and that this comes under Article 2 of the Ordinance which reads as follows:—

SCHEDULE.

	Description of Suit.	Period of Limitation.	Time from which period begins to run.
2	For the wages of a household servant artisan or a labourer.	One year.	When the wages accrue due.

Clearly if this article applies the claim is barred. The Plaintiff's answer is firstly that he was not a labourer and that accordingly the appropriate article is Article 84 which provides for a period of three years and under which his claim would not be barred. Secondly he says that his claim is not for wages but for money deposited under an agreement that it shall be payable on demand and that Article 42 applies. This Article provides for a period of 3 years from date of demand so that here again his claim would not be barred.

A "Labourer" was defined by Brett, L.J. in *Morgan* v. *London General Omnibus Co.*, 53 L.J.Q.B. 353 as "a man who digs and does other work of that kind with his hands. A carpenter is not called a labourer because though he works with his hands his work requires skill and training." In India in the case of *Mutsaddi Lal* v. *Bhagwan Das*, I.L.R. 48 Allahabad 164 it was held that a weighman in a shop was not an artisan nor a mere labourer because he has to count and add up and may also perhaps have to calculate the price on the total quantity weighed. Accordingly he did not come within Article 7 of the Indian Act (corresponding to our Article 2) and Article 102 (corresponding to our Article 84) was applied. In the present case the plaintiff is described throughout as a "tindal". The defendant endeavoured to qualify this by saying that it was merely a courtesy title and that he was really only a watchman. This was manifestly absurd as the evidence clearly establishes that the plaintiff was the representative on the spot of the defendant who worked in his sundry goods shop several miles away and that it was his duty to supervise the coolies, keep a check roll (which was produced), and give the coolies surats showing the number of the lorry and the number of cubic yards of metal upon which the coolies were to be paid. At one point in his evidence the defendant referred to him as the clerk and it is obvious that his duties were to a considerable extent clerical. His successor did no manual labour at all. To quote his own words, "I just went to the quarry, measured their work and gave a surat. That was all I did." I hold that plaintiff was not a mere labourer and that Article 2 does not apply.

The other answer put forward by the plaintiff to the defence of limitation is also in my opinion a good one. He argues that even if he was a labourer this is not a claim for wages to which Article 2 should apply but a claim for money deposited under an agreement that it shall be payable on demand and that under article 42 such a claim is not barred until 3 years from the date when the demand is made. Although in his defence the defendant denies that there was an agreement that the wages should accumulate he did not persist in that contention and his books clearly show that that was the arrangement; and I find as a fact that when the plaintiff was promoted from coolie to tindal the parties entered into the arrangement so common among Indians both here and in their own country namely that the salary or wages should be allowed to accumulate and remain with the employer under an agreement that they should be payable on demand and that the plaintiff should draw against what was due to him whenever he required money. That was precisely the position in the case of *Subramanian Chettiar* v. *Kaderesan Chettiăr*, (1916) 32 I.C. 965 where it was held that such money was "money deposited" within the meaning of Article 60 of the Indian Limitation Act (corresponding to our article 42) and that money in the hands of a trader who is not a banker will be "a deposit" in circumstances such as would make it money of a customer when the depositee was a banker. That was the unanimous view of the Madras Court of Appeal and although it is not binding upon this Court it affords a valuable guide and I have no hesitation in coming to a similar conclusion in the present case.

The substantial effect of the arrangement that the plaintiff's wages should remain with the defendant and be allowed to accumulate was that the defendant consented to act as the plaintiff's banker. At the end of each month the wages for that month must be regarded as having been paid and forthwith deposited with the defendant for safe custody. The plaintiff was credited or must be taken to have been credited with the $25/- each month. He was entitled to and did in fact draw money from time to time up to the amount of his credit balance and such drawings were debited against his account. Finally on demand he was entitled to have a balance struck and to be paid what was found to be due to him exactly as would have been the case if he had deposited with a banker. I am satisfied that article 42 applies and that the defence of limitation fails.

There will be judgment for the plaintiff for $748.45.

I make an order allowing costs to include profit costs.

Judgment accordingly.

Solicitor for the plaintiff—*K. S. Lim.*

Solicitors for the Defendants—

Logan, Ross & Samuel.

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

September, 21, 1934.

K. A. R. RAMANATHAN CHETTY .. Plaintiff

vs.

TAN CHENG HOO & ANOR.....Defendants.

[PENANG SUIT No. 471 of 1932]

Practice—Judgment—Assignment of—Omission of Assignee to give Notice to debtor—Application for leave to execute—Non-joinder of Assignor as a party—Irregularity of Order—Civil Procedure Code Ss. 591 (1) (a), 1339.

The assignee of a judgment debt who has not given notice to the debtor of the assignment cannot sue or issue execution on the judgment debt unless he makes the assignor a party to the proceedings.

If the assignor is not made a party to the application for leave to issue execution and if an *exparte* order is made thereon, such order is defective and the defect cannot be cured under section 1339 of the Civil Procedure Code which applies only to cases in which there is a non-compliance with any provision in the Code or rule of practice.

Adjourned Summons.

This was a Summons taken out by the 1st defendant applying for the release of his immoveable property seized under an order of Court dated the 1st September, 1933. The application was supported by an affidavit of the applicant from which it appears that the plaintiff assigned to one Chee Tiang Guan (hereinafter referred to as "the assignee") the benefit of the judgment recovered in this action against both defendants, that the assignee did not give to the defendants notice of the assignment, that, without joining the assignor as a party, he applied to Court for leave to issue execution against the defendants, that an order was made granting the necessary leave and that in pursuance of the last mentioned order the immoveable property of the 1st defendant was seized. The applicant contended that the property should be released on the ground that no notice of the assignment was given to him and his co-defendant. The absence of notice was not disputed.

Ong Huck Lim for 1st defendant (applicant)

Regester for plaintiff's assignee—(respondent)

Cur. Ad. Vult.